

No. 41535-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOSE LOUIS ANGUIANO-ALCAZAR,

Appellant.

STATE OF WASHINGTON
CLERK OF COURT
JULY 1 2015

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Jose Anguiano-Alcazar was charged in count I with possession of heroin with intent to deliver but the jury was instructed on the elements of delivery of a controlled substance. Because Mr. Anguiano-Alcazar was convicted of a crime not charged, his constitutional right to notice of the charge was violated.

In count II, Mr. Anguiano-Alcazar was charged with selling heroin for profit but the information did not allege that he knew the substance sold for profit was a controlled substance. Because knowledge that the substance sold is a controlled substance is an essential element of the crime, the charge for count II was also constitutionally deficient.

Finally, as prosecuted in this case, the crimes of delivery of a controlled substance and sale of a controlled substance for profit were the same in fact and law. Therefore, Mr. Anguiano-Alcazar's constitutional right to be free from double jeopardy was violated.

B. ASSIGNMENTS OF ERROR

1. Mr. Anguiano-Alcazar was convicted of a crime in count I for which he was not charged, in violation of his state and federal constitutional right to notice of the charge.

2. The charge for count II omitted an essential element of the crime, in violation of Mr. Anguiano-Alcazar's federal and state constitutional right to notice of the charge.

3. The convictions for count I and count II violated Mr. Anguiano-Alcazar's constitutional right to be free from double jeopardy.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution, an accused person is entitled to notice of the charge and may not be convicted of a crime not charged. Was Mr. Anguiano-Alcazar's constitutional right to notice of the charge violated where he was charged with the crime of possession of heroin with intent to deliver but the jury was instructed on the elements of a separate crime—delivery of a controlled substance?

2. It is a constitutional requirement that a charging document in a criminal case set forth all essential elements of the crime. An essential element of the crime of sale of a controlled substance for profit is that the accused knew the substance sold for profit was a controlled substance. Was the information constitutionally deficient where it omitted this essential element?

3. A criminal defendant's constitutional right to be free from double jeopardy is violated where the defendant is prosecuted and convicted of two crimes that are the same in fact and in law. Was Mr. Anguiano-Alcazar's constitutional right to be free from double jeopardy violated where he was convicted of delivery of a controlled substance and sale of a controlled substance for profit where, as prosecuted in this case, the two offenses were the same in fact and in law?

D. STATEMENT OF THE CASE

Count I of the information stated Mr. Anguiano-Alcazar was charged with the crime of "delivery of a controlled substance—heroin," contrary to RCW 69.50.401(1), (2)(a). CP 3. But the information set forth the elements of a different crime—possession of heroin with the intent to deliver. Count I alleged that Mr. Anguiano-Alcazar "did knowingly possess a controlled substance with intent to deliver, to-wit: Heroin." CP 3.

In count II, the State alleged that Mr. Anguiano-Alcazar "did sell for profit a controlled substance classified in Schedule I, RCW 69.50.204, to wit: heroin," contrary to RCW 69.50.410(1), (3)(a). CP 3. But the information did not allege that Mr. Anguiano-Alcazar

knew that the substance sold for profit was a controlled substance.
CP 3.

For both counts, the State alleged that Mr. Anguiano-Alcazar committed the offense within 1,000 feet of a school bus route stop, in violation of RCW 69.50.435(1)(b) and RCW 9.94A.533(6).¹ CP 3.

At the jury trial, Clark County Sheriff Deputy Steven Nelson testified the police engaged the services of Thomas Milam, a confidential informant, to arrange a controlled buy with Mr. Anguiano-Alcazar. 9/22/10RP 143-45. On September 17, 2009, Deputy Nelson contacted Mr. Milam, searched him, and gave him an amount of cash whose serial numbers had been recorded. 9/22/10RP 146-48. He then drove Mr. Milam to the pre-arranged location for the controlled buy. 9/22/10RP 149. Surveillance units were set up in the area where the buy occurred and outside Mr. Anguiano-Alcazar's home. 9/22/10RP 149.

Mr. Milam testified he contacted Mr. Anguiano-Alcazar and arranged to buy a quantity of heroin from him. 9/22/10RP 173. On September 17, he met Mr. Anguiano-Alcazar near the Muchas Gracias restaurant in Vancouver and walked with him into the

¹ The State also alleged for both counts that Mr. Anguiano-Alcazar "committed the current offense shortly after being released from incarceration RCW 9 94A 535(3)(t)" and stated that it was seeking an exceptional sentence upward based on that aggravating factor CP 3. The jury later found Mr. Anguiano-Alcazar was not guilty of the aggravating factor. CP 73.

restaurant. 9/22/10RP 176-77. Mr. Anguiano-Alcazar ordered two drinks and the two sat down at a table in the lounge. 9/22/10RP 177. Mr. Milam gave Mr. Anguiano-Alcazar the money under the table and Mr. Anguiano-Alcazar gave him the heroin. 9/22/10RP 177. But Mr. Anguiano-Alcazar took back the heroin, saying he was uncomfortable because a family was sitting at a nearby table. 9/22/10RP 177. According to Mr. Milam, Mr. Anguiano-Alcazar then went to the men's room and put the heroin under a garbage can. 9/22/10RP 178-79. He returned to the table and told Mr. Milam he could retrieve the heroin in the men's room. 9/22/10RP 179. Mr. Milam went to the men's room and retrieved the heroin and the two left the restaurant soon after. 9/22/10RP 180. Mr. Milam then returned to Deputy Nelson's location and gave him the heroin. 9/22/10RP 180.

Mr. Anguiano-Alcazar testified that he went to the Muchas Gracias restaurant with Mr. Milam but said he did not sell any heroin to Mr. Milam. 9/22/10RP 322. Instead, Mr. Milam sold him a quantity of heroin. 9/22/10RP 322

In closing argument, the deputy prosecutor acknowledged that the two charges—for delivery of a controlled substance and for sale of a controlled substance for profit—were "based on the same

actions." 9/23/10RP 368-69. Mr. Anguiano-Alcazar's actions of delivering the heroin under the table and of placing the heroin under the garbage can in the men's room both qualified as deliveries and were both sales for profit. 9/23/10RP 370.

For count I, delivery of a controlled substance, the jury was instructed that to find Mr. Anguiano-Alcazar guilty of the crime, it must find the following elements were proved beyond a reasonable doubt:

- (1) That on or about September 17, 2009, the defendant delivered a controlled substance;
- (2) That the defendant knew that the substance delivered was a controlled substance—Heroin; and
- (3) That this act occurred in the State of Washington. . . .

CP 52 (Instruction No. 9).

For count II, sale of a controlled substance for profit, the jury was instructed it must find the following elements:

- (1) That on or about September 17, 2009, the defendant sold a controlled substance;
- (2) That the sale was for profit;
- (3) That the defendant knew that the substance sold was a controlled substance—Heroin; and
- (4) That this act occurred in the State of Washington. . . .

CP 57 (Instruction No. 13).

The jury found Mr. Anguiano-Alcazar guilty of count I, "delivery of a controlled substance—heroin," CP 65, and guilty of

count II, "selling for profit any controlled substance." CP 66. The jury also found Mr. Anguiano-Alcazar committed the crimes within one thousand feet of a school bus route stop. CP 67-68.

At sentencing, the court found the two counts encompassed the same criminal conduct and therefore did not include either conviction in the offender score for the other. CP 107. The court imposed a standard range sentence, adding 24 months for the school bus zone enhancement. CP 108-09.

E. ARGUMENT

1. MR. ANGUIANO-ALCAZAR'S
CONSTITUTIONAL RIGHT TO NOTICE OF
THE CHARGE WAS VIOLATED WHERE HE
WAS TRIED AND CONVICTED IN COUNT
ONE FOR AN OFFENSE NOT CHARGED

a. A criminal defendant may not be prosecuted for a crime that is different from the crime charged in the information. It is a fundamental principle of criminal procedure, embodied in the state and federal constitutions, that an accused person must be informed of the criminal charge he is to meet at trial and cannot be tried for an offense not charged. U.S. Const. amend. VI²; Const.

² The Sixth Amendment provides "In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation "

art. I, § 22³; State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995) (citing Auburn v. Brooke, 119 Wn.2d 623, 627, 836 P.2d 212 (1992); State v. Irizarry, 111 Wn 2d 591, 592, 763 P.2d 432 (1988)).

The judicially approved means of ensuring constitutionally adequate notice is to require a charging document set forth the essential elements of the alleged crime. See State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000). This "essential elements rule" has long been settled law in Washington and is constitutionally mandated. State v. Quismundo, 164 Wn.2d 499, 503, 192 P.3d 342 (2008) (citing Vangerpen, 125 Wn.2d at 788).

A charging document is constitutionally adequate only if all essential elements are included on the face of the document, regardless of whether the accused received actual notice of the charge. Quismundo, 164 Wn.2d at 504; Vangerpen, 125 Wn.2d at 790; State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992); State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987).

If the reviewing court concludes the necessary elements are not found or fairly implied in the charging document, the court must presume prejudice. State v. McCarty, 140 Wn.2d 420, 425, 998

³ Article I, section 22 provides "In criminal prosecutions the accused shall have the right to . . . demand the nature and cause of the accusation against him [and] to have a copy thereof."

P.2d 296 (2000). The remedy is reversal of the conviction and dismissal of the charge without prejudice to the State's ability to refile the charge. Vangerpen, 125 Wn.2d at 792-93.

In Vangerpen, the charging document stated the charged offense was "attempted murder in the first degree" but then alleged the elements of attempted murder in the second degree.

Vangerpen, 125 Wn.2d at 792. The jury was instructed on the elements of attempted murder in the first degree. Id. at 788. The court held the defendant's constitutional right to notice of the charge was violated, because he was charged with the offense of attempted second degree murder but was tried and convicted of a different offense—attempted first degree murder. Id. at 792-93. Although the jury was properly instructed on the elements of attempted murder in the first degree, this did not cure the constitutional defect, as "proper jury instructions cannot cure a defective information." Id. at 791 (citing State v. Holt, 104 Wn.2d 315, 322, 704 P.2d 1189 (1985)). "Jury instructions and charging documents serve different functions." Id. In addition, even though the information cited the proper statute and correctly named the offense, this was not sufficient, because "naming an offense is insufficient to charge a crime unless the name of the offense

apprises the defendant of all of the essential elements of the crime." Id. at 787 (citing Brooke, 119 Wn.2d at 635).

Vangerpen requires that Mr. Anguiano-Alcazar's conviction for count I be reversed.

b. Mr. Anguiano-Alcazar was tried and convicted of an offense not charged in count I, in violation of his constitutional right to notice of the charge As in Vangerpen, Mr. Anguiano-Alcazar was tried and convicted of an offense not charged in the information for count I. Count I stated that Mr. Anguiano-Alcazar committed the crime of "delivery of a controlled substance—heroin," contrary to RCW 69.50.401(1), (2)(a). CP 3. But the information set forth the elements of a different crime—possession of heroin with the intent to deliver. Count I alleged that Mr. Anguiano-Alcazar "did knowingly possess a controlled substance with intent to deliver, to-wit: Heroin." CP 3.

The jury was instructed on the elements of the crime of delivery of a controlled substance, not the charged crime of possession with intent to deliver. The jury was instructed that to find Mr. Anguiano-Alcazar guilty, it must find beyond a reasonable doubt that he "delivered a controlled substance," and that he "knew that the substance delivered was a controlled substance—Heroin."

CP 52. These are not the same elements as the offense charged in the information—possession of heroin with intent to deliver.

The essential elements of the crime of delivery of a controlled substance are (1) delivery of a controlled substance, and (2) knowledge that the substance delivered was a controlled substance. RCW 69.50.401(a); State v. DeVries, 149 Wn.2d 842, 849-50, 72 P.3d 748 (2003). By contrast, the essential elements of the crime of possession of a controlled substance with intent to deliver are (1) unlawful possession of (2) a controlled substance (3) with intent to deliver. RCW 69.50.401; State v. Valencia, 148 Wn. App. 302, 314, 198 P.3d 1065 (2009), rev'd on other grounds by 169 Wn.2d 782, 239 P.3d 1059 (2010). Thus, the information in this case omitted the essential element of *actual delivery* of the controlled substance.

Even though the information cited the proper statute and correctly named the offense, this was not sufficient, as "naming an offense is insufficient to charge a crime unless the name of the offense apprises the defendant of all of the essential elements of the crime." Vangerpen, 125 Wn.2d at 787. The name "delivery of a controlled substance" does not apprise the accused of the required element of guilty knowledge. Thus, because Mr.

Anguiano-Alcazar was tried and convicted of a crime not charged, his constitutional right to notice of the charge was violated.

Vangerpen, 125 Wn.2d 782.

c. Count I must be reversed and dismissed without prejudice to the State's ability to refile a charge consistent with the jury instructions. The Washington Supreme Court has repeatedly held that the remedy for a charging document that does not contain all of the essential elements of the crime is reversal and dismissal of the charge without prejudice to the State's ability to refile the charge. Quismundo, 64 Wn 2d at 504-05; Vangerpen, 125 Wn.2d at 792-93. The State may not refile a charge that is inconsistent with the jury instructions and verdict. Vangerpen, 125 Wn.2d at 793-94.

Here, Mr. Anguiano-Alcazar was charged with the crime of possession of a controlled substance with intent to deliver but convicted of the crime of delivery of a controlled substance. The conviction must be reversed and the charge dismissed without prejudice to the State's ability to refile a charge of delivery of a controlled substance. Vangerpen, 125 Wn.2d at 792-94.

2. COUNT TWO IS CONSTITUTIONALLY DEFECTIVE BECAUSE IT OMITTED AN ESSENTIAL ELEMENT OF THE CRIME OF SALE OF A CONTROLLED SUBSTANCE FOR PROFIT, i.e., THAT MR. ANGUIANO-ALCAZAR KNEW THAT THE SUBSTANCE HE ALLEGEDLY SOLD WAS A CONTROLLED SUBSTANCE

a. The charging document must set forth every essential element of the crime. As stated, it is a fundamental principle of criminal procedure that a charging document must set forth all of the essential elements of the alleged crime. Quismundo, 164 Wn.2d at 503; Vangerpen, 125 Wn.2d at 788; U.S. Const. amend. VI; Const. art. I, § 22.

All essential elements of the crime must be included in the information so as to apprise the accused of the charges and allow him to prepare a defense, and so that he may plead the judgment as a bar to any subsequent prosecution for the same offense. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must state *all* essential elements of the crime charged, both statutory and non-statutory. Kjorsvik, 117 Wn.2d at 102.

The constitutional requirement that the information contain every essential element of the crime is not relaxed simply because the challenge is raised for the first time on appeal. But for post-

verdict challenges, the charging document will be construed liberally and deemed sufficient if the necessary facts appear in any form, or by fair construction may be found, on the face of the document. Kjorsvik, 117 Wn.2d at 105. An information cannot be upheld, regardless of when the challenge is raised, if it does not contain all the essential elements, as "the most liberal possible reading cannot cure it." State v. Hopper, 118 Wn.2d 151, 157, 822 P.2d 775 (1992).

Every material element of the charge, along with all essential supporting facts, must be set forth in the information with clarity. McCarty, 140 Wn.2d at 425 (citing CrR 2.1(a)(1) and Kjorsvik, 117 Wn.2d at 97). The charging document must provide the defendant with "a plain, concise and definite written statement of the essential facts constituting the offense charged." CrR 2.1(a)(1). The information must enable a person of common understanding to know what is intended. RCW 10.37.050(6); State v. Long, 19 Wn. App. 900, 903, 578 P.2d 871 (1978).

b. Guilty knowledge is an essential non-statutory element of the crime of sale of a controlled substance for profit.

Count II alleged that Mr. Anguiano-Alcazar "did sell for profit a controlled substance classified in Schedule I, RCW 69.50.204, to

wit: heroin," contrary to RCW 69.50.410(1), (3)(a). CP 3. But the information did not allege that Mr. Anguiano-Alcazar knew that the substance sold for profit was a controlled substance. CP 3.

RCW 69.50.410(1) provides: "Except as authorized by this chapter it is a class C felony for any person to sell for profit any controlled substance or counterfeit substance classified in Schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana." Although knowledge that the substance sold was a controlled substance is not a *statutory* element of the crime, it is nonetheless an essential element.

In State v. Boyer, 91 Wn.2d 342, 344, 588 P.2d 1151 (1979), the Washington Supreme Court held that guilty knowledge, an understanding of the identity of the product being delivered, is an essential non-statutory element of the crime of delivery of a controlled substance (citing RCW 69.50.401). The court concluded that, in the absence of express legislative language to the contrary, the history and language of the statute indicated "that guilty knowledge is intrinsic to the definition of the crime itself." Id. Otherwise, "even a postal carrier would be guilty of the crime were he innocently to deliver a package which in fact contained a

forbidden narcotic." Id. Such a result could not have been intended by the Legislature. Id.

Consistent with Boyer, in other cases Washington courts have held that crimes involving trafficking in controlled substances—as opposed to mere possession of a controlled substance—contain the essential element that the defendant knew the substance involved was a controlled substance. See, e.g., State v. Warnick, 121 Wn. App. 737, 90 P.3d 1105 (2004) (crime of manufacture of a controlled substance contains essential non-statutory element of guilty knowledge); State v. Nunez-Martinez, 90 Wn. App. 250, 253-54, 951 P.2d 823 (1998) (the elements of delivery of a controlled substance are (1) delivery, and (2) knowledge that the substance being delivered is a controlled substance); State v. Smith, 17 Wn. App. 231, 233, 562 P.2d 659 (1977) (intent to deliver or manufacture a controlled substance is a required element of RCW 69.50.401(a)); cf. State v. Sims, 119 Wn.2d 138, 142, 146, 829 P.2d 1075 (1992) (there is no added element of guilty knowledge in prosecution for possession of a controlled substance with intent to deliver, because crime already contains statutory element of intent and "[i]t is impossible for a

person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing").

Courts infer the element of guilty knowledge for drug trafficking crimes because such crimes are considered "mala in se." State v. Hartzog, 26 Wn. App. 576, 615 P.2d 480 (1980), aff'd in part, rev'd in part on other grounds by 96 Wn.2d 383, 635 P.2d 694 (1981). "A crime which is malum in se is defined as an act which is 'immoral or wrong in . . . (itself), or naturally evil, such as murder, rape, arson, burglary and larceny.'" Id. at 592 (citing 22 C.J.S. Crim. Law § 8, at 19-20 (1961)). This class of crime generally involves "moral turpitude." Hartzog, 26 Wn. App. at 592. In contrast, a crime which is "malum prohibitum" is one prohibited by statute because it "infringes 'on the rights of others, although no moral turpitude or dereliction may attach.'" Id. (citing 22 C.J.S. Crim. Law § 8, at 20 (1961)). "Persons who actively participate in the manufacture, delivery or sale of drugs are perceived by the community as engaging in more socially harmful conduct than those who merely possess." Hartzog, 26 Wn. App. at 593; see also Smith, 17 Wn. App. at 234 ("trafficking in narcotic drugs is unquestionably conduct involving moral turpitude"). Thus, "[c]rimes which are mala in se, such as delivery of a controlled substance,

require guilty knowledge which has been defined as 'an understanding of the identity of the product being delivered.'" Id. (citing Boyer, 91 Wn.2d at 344).

Here, Mr. Anguiano-Alcazar was convicted of the crime of sale of a controlled substance for profit, RCW 69.50.410. Washington courts have not specifically addressed whether the crime contains the essential non-statutory element of guilty knowledge. But in light of the above principles, there is no reasonable basis to distinguish the crime from other drug trafficking crimes such as delivery or manufacture of a controlled substance. All of the crimes involve conduct of moral turpitude. Therefore, guilty knowledge is an essential ingredient of the crime. To hold otherwise would make anyone criminally liable who accidentally sold a substance for profit without knowing the substance was a controlled substance. The Legislature could not have intended such a result.

c. Count II was constitutionally defective because it did not allege that Mr. Anguiano-Alcazar knew that the substance he allegedly sold for profit was a controlled substance. Count II alleged that Mr. Anguiano-Alcazar "did sell for profit a controlled substance classified in Schedule I, RCW 69.50.204, to wit: heroin,"

contrary to RCW 69.50.410(1), (3)(a). CP 3. The information did not allege that Mr. Anguiano-Alcazar knew that the substance sold for profit was a controlled substance.

In State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992), the court concluded that because guilty knowledge is an essential element of the crime of delivery of a controlled substance, "it is subject to the Kjorsvik mandate of inclusion in the charging document." The charging document in Johnson was constitutionally deficient because it did not allege the element of "knowingly." Id. at 150.

Similarly, here, because the information did not allege the element of "knowingly," it is constitutionally deficient. The remedy is reversal and dismissal of the charge without prejudice to the State's ability to refile it. Vangerpen, 125 Wn.2d at 792-94.

3. CONVICTIONS FOR DELIVERY OF A CONTROLLED SUBSTANCE AND SALE OF A CONTROLLED SUBSTANCE FOR PROFIT, BASED ON THE SAME ACT, VIOLATED MR. ANGUIANO-ALCAZAR'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY

a. The Double Jeopardy Clause bars two convictions for the same offense. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and article I, section

9 of the Washington Constitution protect a criminal defendant from multiple convictions and punishments for the same offense.⁴ Ball v. United States, 470 U.S. 856, 861, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). The fact of conviction alone, even without the imposition of sentence, constitutes punishment for purposes of a double jeopardy analysis. State v. Gohl, 109 Wn. App. 817, 822, 37 P.3d 293 (2001) (citing Ball, 470 U.S. at 865; In re Pers. Restraint of Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000)).

Where a defendant is charged with violating two separate statutory provisions for a single act, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed.2d 306 (1932); In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). The question is whether the Legislature intended to punish the same conduct twice under

⁴ The Fifth Amendment provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb " This clause applies to the states through the Fourteenth Amendment. Benton v Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L Ed 2d 707 (1969) Similarly, article I, section 9 of the Washington Constitution states that "no person shall be twice put in jeopardy for the same offense."

different criminal provisions. State v. Read, 100 Wn. App. 776, 792, 998 P.2d 897 (2000), aff'd, 147 Wn.2d 238, 53 P.3d 26 (2002).

In the absence of a clear statement by the Legislature allowing or disallowing multiple punishments, the "same elements" test set forth in Blockberger, 284 U.S. 299 applies. State v. Meneses, 169 Wn.2d 586, 593-94, 238 P.3d 495 (2010). Here, the statutes do not contain a clear statement of legislative intent and therefore the "same elements" test applies. Id.

By this test, an accused may not be convicted of offenses that are the same in fact and in law. State v. Calle, 125 Wn.2d 769, 777, 108 P.3d 753 (1995).

b. The two offenses violated the Double Jeopardy Clause because they were the same in fact and law. There is no question that Mr. Anguiano-Alcazar's convictions are the same in fact, as they are based on the same act of delivering heroin. See Read, 100 Wn. App. at 791 (second degree murder and first degree assault convictions same in fact where based upon same act, directed at same victim). The deputy prosecutor acknowledged that the two charges—for delivery of a controlled substance and for sale of a controlled substance for profit—were "based on the same actions." 9/23/10RP 368-69. Mr. Anguiano-Alcazar's actions of

delivering the heroin under the table and of placing the heroin under the garbage can in the men's room both qualified as deliveries and were both sales for profit. 9/23/10RP 370.

Moreover, the two convictions are the same in law. The question is whether, "as charged and proved at trial, . . . each offense required proof of a fact that the other did not." Meneses, 169 Wn.2d at 594.

In count I, Mr. Anguiano-Alcazar was prosecuted for delivery of a controlled substance, which required the State to prove he (1) delivered a controlled substance and (2) knew the substance was a controlled substance. CP 52 ("to convict" instruction). "Delivery" was defined as "the actual or constructive transfer of a controlled substance from one person to another." CP 53.

For count II, Mr. Anguiano-Alcazar was prosecuted for sale of a controlled substance for profit, which required the State to prove he (1) sold a controlled substance (2) for profit, and (3) that he knew the substance sold was a controlled substance. CP 57 ("to convict" instruction). "To sell" was defined as "to pass title and possession for a price, whether or not the price is paid immediately or at a future date. Price means anything of value. For profit

means the obtaining of anything of value in exchange for the controlled substance." CP 58.

Thus, for both crimes, the State was required to prove Mr. Anguiano-Alcazar transferred possession of a controlled substance to Mr. Milam and that he knew the substance was a controlled substance. Only one of the crimes required proof of a fact that the other did not. The charged crime of sale of a controlled substance for profit required the State to prove the additional fact that the transfer amounted to a sale, i.e., that it was for profit and entailed a transfer of title. Otherwise, as prosecuted in this case, the two crimes required proof of the same facts.

As the State acknowledged, the two crimes were the same in fact because they were based on the same underlying act. In addition, as prosecuted in this case, each crime did not require proof of a fact that the other did not. Therefore, they were the same in law. Thus, the two convictions violated Mr. Anguiano-Alcazar's constitutional right to be free from double jeopardy. Blockburger, 284 U.S. at 304; Meneses, 169 Wn.2d at 593-94.

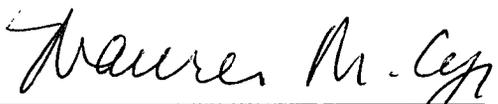
c. The remedy is vacation of the conviction for the lesser offense. Where two convictions violate the prohibition against double jeopardy, the remedy is to vacate the lesser

conviction and remand for resentencing on the remaining conviction. State v. League, 167 Wn.2d 671, 672, 223 P.3d 493 (2009). Thus, the conviction for delivery of a controlled substance must be vacated.

F. CONCLUSION

Mr. Anguiano-Alcazar was convicted in count I for an offense not charged, in violation of his constitutional right to notice of the charge. The conviction for count I must be reversed and dismissed without prejudice to the State's ability to refile a charge consistent with the jury instructions. Count II was constitutionally defective because it omitted an essential element of the crime. Therefore, the conviction for count II must also be reversed and dismissed without prejudice to the State's ability to refile the charge. Finally, the two convictions for delivery of a controlled substance and sale of a controlled substance for profit were the same in fact and in law, in violation of the Double Jeopardy Clause. The conviction for the lesser offense must be vacated.

Respectfully submitted this 31st day of May 2011.


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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	
)	
JOSE ANGUIANO-ALCAZAR,)	
)	
Appellant.)	

NO. 41535-6-II

BY STATE OF WASHINGTON
Clerk

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CLERK OF COURT

DECLARATION OF DOCUMENT FILING AND SERVICE

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